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IN THE COURT OF APPEALS OF INDIANA

MICHAEL HALEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0805-CR-444
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0605-FA-9

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Haley appeals his ten-year sentence for one count of Class C felony child molesting and one count of Class C felony child exploitation. We affirm.

Issues

Haley raises two issues, which we restate as:

I. whether the trial court abused its discretion in sentencing him; and

II. whether his sentence is inappropriate.

Facts

Eleven-year-old K.M. was the daughter of Haley's girlfriend. On March 13, 2006, Haley was babysitting K.M. after school when he fondled her breasts and vagina. That same day, Haley was in possession of numerous images of child pornography.

On May 31, 2006, the State charged Haley with Class A felony child molesting, Class C felony child molesting, Class D felony dissemination of material harmful to minors, Class D felony possession of child pornography, and Class D felony obstruction of justice. On June 2, 2006, the State amended the information to include a charge of Class C felony child exploitation. On March 5, 2008, Haley pled guilty to the Class C felony child molesting charge and the Class C felony child exploitation charge, and the remaining charges were dismissed. Following a sentencing hearing, the trial court sentenced Haley to five years on each count and ordered the sentences to be served consecutively for a total sentence of ten years. Haley now appeals his sentence.

Analysis

I. Abuse of Discretion

Haley first contends that the trial court abused its discretion in considering the aggravating circumstances used to increase his sentence. In reviewing a sentence imposed under the current advisory scheme, we engage in a four-step process. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal only for an abuse of discretion. Id. Third, the weight given to those reasons—the aggravators and mitigators—is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

One way in which the trial court might abuse its discretion is by entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons. Id. at 490. Under these circumstances, "remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491.

The trial court's sentencing order explains the aggravators as:

> 1. The Court has considered that there was a substantial degree of care and planning on the part of the defendant in the

> commission of the crime, it does not appear to be spontaneous, and the defendant's role was that of a principal.
>
> 2. The Court has considered that the facts of the instant offense are particularly heinous or disturbing.
>
> 3. The Court has considered the crime was particularly devastating to the victim, her family members, and/or relatives, and that the defendant was in a position of trust with the victim.
>
> 4. The Court has considered the defendant was in a position of having care, custody, or control of the victim of the offense, to-wit: occasionally picking her up from school with her mother's knowledge.
>
> 5. The Court has considered that, accordingly [sic] to police reports, the victim of the offense claimed that the defendant threatened to harm her if she ever told anybody about the offense.
>
> 6. The Court has considered that the defendant was found to be a sexually violent predator pursuant to I.C. 5-2-12-13.

App. p. 56.

Haley does not challenge the first aggravating circumstance found by the trial court. He does argue that there are no facts to support the trial court's finding that the commission of this crime was particularly heinous or disturbing. Although the trial court did not expand on this aggravator, it is supported by the record, which shows that K.M. was the daughter of Haley's girlfriend and trusted by Haley's family. Moreover, Haley gave K.M. Vicodin and alcohol to facilitate the molestation. These facts support the trial court's finding.

Haley also claims that the trial court did not explain, and nothing in the record indicates, how the crimes affected the victim or her family.[1] Again, Haley was dating K.M.'s mother when the molestation occurred. It was through his relationship with her mother that Haley gained the access to and the position of trust with K.M. Further, at the sentencing hearing, the prosecutor pointed out that a plea bargain was reached in this case because K.M. was in a "residential psychiatric treatment facility because of what he did to her . . . ." Tr. p. 18. The record supports this aggravator.

We agree with Haley that the fourth aggravator is largely redundant of the third aggravator. Nevertheless, reversal is not required because the error is harmless. Likewise, we agree with the State that the any error in the trial court's consideration of the fifth and sixth aggravators is harmless.

In other words, even if the trial court abused its discretion in considering the last three aggravators, the first three aggravators warranted the increased sentence. We are confident, given the planning of the crime, the nature of the offense, and Haley's position

[1] Although Haley does not make the specific argument, the State claims that the trial court was required to explain why the impact associated with the crime was greater than usual. See Thompson v. State, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003) ("We are to presume the legislature considered the emotional and psychological impact on the victim when it set the presumptive sentence for a crime. . . . Therefore, the emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime."). Under the current sentencing scheme, however, a sentence is not "enhanced" by aggravators so there is no risk of double enhancement based on the trial court's consideration of the emotional and psychological impact on the victim. See Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008) ("Under the 2005 statutory changes, trial courts do not 'enhance' sentences upon finding such aggravators. Consequently, we conclude that when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender's sentence."); see also Ind. Code § 35-38-1-7.1(d) ("A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances."). Accordingly, under the 2005 sentencing scheme, the trial court is no longer required to explain that the emotional or psychological impact is greater than that usually associated with the crime.

of trust, the trial court would have imposed the same five-year sentences for each offense even if it had not considered the last three aggravators.

As for the consecutive sentences, Haley claims that the trial court did not specify the circumstances that justify consecutive sentences. We review a trial court's decision to impose consecutive sentences for an abuse of discretion. Quiroz v. State, 885 N.E.2d 740, 741 (Ind. Ct. App. 2008), trans. denied. "A consecutive sentence must be supported by at least one aggravating circumstance." Id. The same aggravator may be used both to increase a sentence and to justify consecutive sentences. See Johnson v. State, 837 N.E.2d 209, 216 (Ind. Ct. App. 2005). Here, any of the valid aggravators also support the trial court's imposition of consecutive sentences. Haley has not established an abuse of discretion in imposing consecutive sentences.

II. Appropriateness

Haley also argues that his ten-year sentence is inappropriate in light of the nature of the offenses and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. Haley has not met this burden.

As for the nature of the offenses, Haley was in a position of trust with K.M. as he babysat her after school with her mother's permission. Also troubling is the fact that

Haley was dating K.M.'s mother when the molestation occurred. Moreover, Haley gave K.M. Vicodin and alcohol to aid in the commission of the crime. This was a planned and deliberate sexual offense against an eleven-year-old girl. Regarding the child exploitation conviction, Haley had an extensive collection of images that depict children posing in sexual positions and engaging in sexual conduct with adults.

As for Haley's character, we acknowledge his guilty plea, but note that he received a substantial benefit in exchange for the plea, including the dismissal of a Class A felony. Further, we also acknowledge that Haley has expressed remorse for his crimes. Nevertheless, the nature of the offenses warrants the consecutive five year sentences. Haley has not established that his sentence is inappropriate.

Conclusion

To the extent that the trial court abused its discretion in considering the aggravators, the error is harmless because we are confident the trial court would have imposed the same sentence in light of the proper aggravators. Also, Haley has not established that his ten-year sentence is inappropriate. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.